

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY J. KEATING and U.S. POSTAL SERVICE,
POST OFFICE, Wilkes-Barre, PA

*Docket No. 98-1063; Submitted on the Record;
Issued February 15, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On June 15, 1993 appellant, a letter carrier, sustained an injury while in the performance of his duties when his postal vehicle was struck from behind. The Office accepted his claim for cervical and lumbosacral sprain and placed him on the periodic compensation rolls.

On January 19, 1995 Dr. Joseph R. Sgarlat, an orthopedic surgeon and Office referral physician, reported that appellant's physical findings did not correlate with his extensive complaints. It was his opinion that appellant was capable of returning to work in, at least, the lighter type of indoor work that he was performing prior to the motor vehicle accident. Dr. Sgarlat diagnosed mild residuals of the percutaneous disc procedure performed on the lumbar spine and a mild disc herniation at C5-6 that did not require any medical or surgical treatment. There was, in fact, no need for appellant to continue to receive formal physical therapy. Dr. Sgarlat continued: "[Appellant] has recovered from the [motor vehicle accident] which, in [my] opinion, at most, caused a temporary increase in his prior low back complaints."

On March 3, 1995 Dr. William A. Black, Jr., appellant's treating neurologist, released appellant to sedentary employment with restrictions. Appellant returned to limited duty on March 10, 1995 but stopped work on March 14, 1995. The Office accepted that appellant sustained a recurrence of disability on that date and paid compensation for temporary total disability.

On March 24, 1995 Dr. Albert D. Janerich, a specialist in physical medicine and rehabilitation and one of appellant's treating physicians, reported the following:

"My impression is that the etiology of this gentleman's neck pain and low back pain relate to injuries he sustained while working June 15, 1993 consisting of a musculoligamentous strain to the cervical spine and a musculoligamentous strain to the lumbar spine with superimposed dis[c] disease treated operably by Dr. Black as well as myofascitis involving the right and left iliolumbar area and a mild synovitis involving the sacroiliac joints."

On May 3, 1995 Dr. Janerich reexamined appellant and reported that regrettably appellant's condition was chronic and that the likelihood of any further significant improvement was remote. He felt that appellant was totally disabled from any form of gainful employment.

The Office found a conflict in medical opinion and referred appellant, together with the case record and a statement of accepted facts, to Dr. David R. Cooper, a Board-certified orthopedic surgeon, for an impartial medical opinion. On May 18, 1995 Dr. Cooper reported that appellant had no residuals from any motor vehicle accident occurring on or about January 15, 1993. He stated:

"That injury was mild, resulting in cervical/lumbar sprain/strain superimposed upon preexistent degenerative conditions. Those degenerative conditions have not been caused, aggravated or exacerbated by the accident, and this gentleman needs no further medical, surgical, physical therapy, chiropractic or psychological care for any residuals of the 1993 injury. He may return to his previous occupation without restrictions."

On March 11, 1996 the Office issued a notice of proposed termination.

Appellant's attending physician, Dr. William P. Smedley, a general surgeon, submitted form reports indicating that appellant remained permanently disabled as a result of lumbosacral sprain and bulging disc due to his June 15, 1993 employment injury.

In a decision dated April 30, 1996, the Office terminated appellant's compensation benefits after April 30, 1996 on the grounds that the weight of the medical evidence confirmed that he no longer suffered from residuals of his January 15, 1993 employment injury.

Appellant requested a review of the written record by an Office hearing representative. He submitted a May 20, 1996 report from Dr. Janerich, who reviewed his treatment of appellant and the results of diagnostic testing. The hearing representative offered the following opinion:

"It is my feeling that as a result of injury sustained in a work[-]related motor vehicular accident taking place June 15, 1993, that you sustained a musculoligamentous strain in the cervical spine superimposed on an already established degenerative joint and degenerative disc disease which remains incompletely improved."

“You also sustained a herniated disc at L5[-]S1 requiring surgery conducted by William A. Black, Jr., M.D. which did not improve your symptoms.

“These diagnostic considerations are not speculative but indeed are definitive rendering you permanently and totally disabled from any form of gainful employment at this time.

“As you have never suffered from pain in the neck and low bac[k] prior to the work[-]related accident, it is my feeling without question that the work[-]related injury in June 1993 accounts for current disability.

“Regretfully, I do not feel you will improve beyond your current status though I will assist in trying to control whatever flares you may develop in the future.”

In a decision dated October 16, 1996, the hearing representative affirmed the termination of appellant’s compensation benefits. He found that the opinion of the impartial medical specialist, Dr. Cooper, represented the weight of the medical opinion evidence and established that appellant had no continuing disability causally related to his June 15, 1993 employment injury.

Appellant requested reconsideration. He submitted an October 10, 1997 report from Dr. Janerich, who reviewed the decision of the hearing representative, described his findings on examination and offered the same opinion he offered on May 20, 1996. He added:

“To that same extent aggravation of the preexisting degenerative joint and degenerative disc disease also took place and he remained incompletely improved; indeed he is getting worse at least subjectively; as trauma accelerates degeneration in a majority of proven cases.”

Dr. Janerich stated:

“To the extent that [appellant] was completely asymptomatic referable to his low back and neck prior to the work[-]related motor vehicle accident taking place on June 15, 1993 makes his current condition and symptoms directly related to that work event. Indeed, the fact that he has had surgery on his low back for injuries sustained from that accident substantiates that claim.”

To the extent that Dr. Cooper could not corroborate appellant’s subjective complaints and objective findings “is not totally clear,” Dr. Janerich reported, “and to that same extent I would disagree with the conclusion set forth by Dr. Cooper....”

Appellant submitted a February 8, 1995 report from Dr. John C. Norcross, a clinical psychologist, who reported that appellant’s clinical depression and chronic pain syndrome were the direct result of his automobile accident in June 1993. Dr. Norcross also explained that appellant’s minimization of the psychological sequelae of the accident/injuries in no way suggested malingering or a conversion disorder but tended to support just the opposite.

Appellant also submitted a May 14, 1996 report from Dr. Richard W. Ottaviani, a chiropractor, who found that x-rays taken on June 8, 1995 demonstrated a subluxation at C4-5. Dr. Ottaviani explained that appellant was poorly healed from his employment injury and would continue to suffer the consequences of his injuries to varying degrees for the foreseeable future.

In a decision dated December 16, 1997, the Office reviewed the merits of appellant's claim and denied modification of its prior decision to terminate compensation benefits. The Office found that the evidence submitted in support of appellant's request for reconsideration was insufficient to alter the weight of the medical evidence, which continued to rest with the opinion of Dr. Cooper, the impartial medical specialist.

The Board finds that the Office did not meet its burden of proof to terminate appellant compensation benefits.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

The Office terminated appellant's compensation benefits on the grounds that the weight of the medical opinion evidence rested with the opinion given by Dr. Cooper, the impartial medical specialist selected to resolve a conflict. The Board finds, however, that the record fails to support a conflict between Dr. Sgarlat, the Office referral physician, and Dr. Janerich, one of appellant's treating physicians. Dr. Sgarlat reported on January 19, 1995 that appellant had recovered from his motor vehicle accident, which, in his opinion, caused at most a temporary increase in his prior low back complaints. Appellant, however, subsequently sustained a recurrence of disability on March 14, 1995 that was causally related to his accepted employment injury. The Office accepted his claim of recurrence and paid compensation for temporary total disability. Consistent with this acceptance, Dr. Janerich reported on March 24, 1995 that the etiology of appellant's neck and low back pain related to the injuries he sustained while working on June 15, 1993. Because Dr. Sgarlat did not examine appellant subsequent to the accepted recurrence of disability on March 14, 1995, his opinion on continuing residuals of diminished probative value to the time period in question in determining the extent to which appellant continued to suffer residuals of his employment injury following the accepted recurrence.³

As Dr. Sgarlat's opinion is insufficient to establish a conflict in medical opinion, Dr. Cooper cannot be considered a referee medical specialist under 5 U.S.C. § 8123(a).⁴ He is,

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *Cf. Brady L. Fowler*, 44 ECAB 343, 353 (1992) (finding that the opinion of an impartial medical specialist was not relevant or probative in adjudicating a claim of recurrence where the specialist did not examine the claimant subsequent to the alleged recurrence).

⁴ This section provides in pertinent part: "If there is disagreement between the physician making the examination

instead, properly considered a second opinion referral physician.⁵ As such, Dr. Cooper's May 18, 1995 opinion that appellant had no residuals of the "mild" motor vehicle accident on June 15, 1993 creates a conflict with the opposing opinions given by appellant's physicians, Drs. Janerich and Smedley. Because this conflict remains unresolved, the Office has not met its burden of proof.

The December 16, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
February 15, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

⁵ *Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990).